No. 87-1051

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

RUSSELL HOBSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY MEMORANDUM

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A Single Physical Act Does Not Constitute a "Pattern of Racketeering Activity" Under RICO

A "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961(5), consists of related, continuing acts of racketeering. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496n.14 (1985). By holding that a

single act which simultaneously violates two statutes invariably constitutes a RICO pattern, *United States v. Hobson*, 825 F.2d 364, 366n.2 (11th Cir. 1987) (Pet. App. 4a-5a), the court of appeals failed to account for *Sedima's* identification of a continuity element in the pattern requirement.

Contrary to the government's argument, Brief in Opp. at 6, *Sedima* addressed the issue of whether predicate acts may be "too closely related" to meet the pattern requirement by including "continuity" as an element of a RICO pattern. The Seventh Circuit subsequently observed that "the continuity aspect of the pattern requirement can have practical importance. One can easily hypothesize cases in which two predicate acts are so closely related that they lack the requisite continuity and do not satisfy the pattern requirement." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986). District Judge Edward Weinfeld similarly described the paradox of *Sedima's* pattern analysis.

> Since *Sedima*, lower courts have sought to refine the notions of a relationship and continuity to develop a meaningful definition of "pattern." On the one hand, they have held that the predicate acts must share sufficient facts in common that they satisfy the requirement of "relatedness." On the other hand, the acts must not be too closely related, because they would then not suggest there is a threat of continuing criminal activity.

Bear Creek Production, Inc. v. Saleh, 643 F. Supp. 489, 495 (S.D.N.Y. 1986).

Sedima prohibits reliance on the rule applied on Hobson's direct-appeal that "two separate crimes [constitute] two separate acts for purposes of the RICO statute", *United States v. Bascaro*, 742 F.2d 1335, 1360-361 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985), if the crimes are "too closely related" to establish continuity. The government does not dispute that the jury instructions limited the RICO predicate acts charged against Hobson to two offenses that arose simultaneously from a single act: a down payment for a shipment of marijuana. *See* Brief in Opp. at 3. To maintain, as the government must, that this "singular criminal event" is not isolated but continuous "stretch[es] these concepts beyond recognition." *Morgan v. Bank of Waukegan*, 804 F.2d at 976 (quoting *Ghouth v. Conticommodity Services*, 642 F. Supp. 1325, 1337 [N.D.Ill. 1986]).

The Eighth Circuit's application of the continuity element in *United States v. Kragness*, 830 F.2d 842, 860-861 (8th Cir. 1987), squarely conflicts with *Hobson* and the government's present analysis of *Sedima*. In *Kragness* defendant Caspersen participated in the successful importation of two marijuana shipments into the United States. *Kragness*, 830 F.2d, at 849. The RICO counts against Caspersen were based on numerous predicate acts in addition to the violations of 21 U.S.C. § 841(a) (importation of marijuana) and 21 U.S.C. § 952(a) (possession of marijuana with intent to distribute) which arose out of the importation of a single shipment. Nevertheless, the Eighth Circuit reversed Caspersen's conviction for a substantive violation of RICO because "it is not proper under RICO to charge two predicate acts where one action violates two statutes." *United States v. Kragness*, 830 F.2d at 861.[1]

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[1] Petitioner does not dispute that a RICO violation may be premised on a single criminal episode or transaction consisting of tow temporally distinct acts each of

By purporting to distinguish *Hobson* as a case involving "a series of acts over a period of time that relate to the two predicate offenses," Brief in Opp. at 6, the government ignores the facts of *Kragness* and the numerous predicate acts sharged in the RICO counts against Caspersen. In *Kragness* the government charged all of the comparable related acts as predicate offenses to no avail because, as in *Hobson*, two of the predicate offenses arose from a single act. *United States v. Kragness*, 830 F.2d at 861. Furthermore, the government's implicit proposal that the jury in *Hobson* could remedy the deficiency in predicate offenses by reference to acts which were not charged as predicate offenses under the RICO counts has no basis in law. The Court cannot avoid the fact that *Hobson* and *Kragness* are diametrically opposed in their respective applications of the RICO pattern requirement, particularly the continuity element introduced by *Sedima*.[2]

This Court recognized the significance of the question presented for review by inviting the development of "a meaningful concept of 'pattern.'" *Sedima*, 473 U.S. at 500. No clearer set of facts could arise for the resolution of what constitutes a RICO pattern than two predicate offenses arising from a single act, as in *Hobson*.

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which gives rise to a RICO predicate offense. *See United States v. Kragness*, 830 F.2d at 861 n.19; *see also* No. 87-1051 Pet. at 12n.4 (cases cited therein); Brief in Opp. at 6n.2. In contrast, both of the predicate acts charged against Hobson arose from a single act.

2 The Justice Department's adjustment of its policy to prohibit RICO prosecutions premised on two offenses which arise from a single act, Brief in Opp. at 6n.2, does not reduce the tension between these decisions and provides no guidance in civil RICO cases. For instance, *Hobson* supports a civil RICO cause of action premised on violations of Section 12 of the Securities Act of 1933, 15 U.S.C. § 77n, and Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, arising from one misstatement of a material fact in a single prospectus.

CONCLUSION

For the foregoing reasons, and those stated in the petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

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Respectfully submitted,

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